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Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
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Washington, D.C.

In the Matter of	
DISTRIBUTION OF 1998 AND 1999 CABLE ROYALTY FUNDS	Docket No. 2001-8 CARP CD 98-99

MUSIC CLAIMANTS' REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. ("SESAC") (collectively, the "Music Claimants" or "Music"), in accordance with the July 18, 2003 Order of the Copyright Arbitration Royalty Panel (the "Panel") and 37 C.F.R. § 251.52, hereby submit their reply to proposed findings of fact and conclusions of law in the above-captioned proceeding.[1]

I. INTRODUCTION

1. The non-Music claimants in their Proposed Findings of Fact and Conclusions of Law ("FF&CL")[2] have deluged the Panel with a torrent of data, methodologies, and calculations. There is a wide gulf in their respective positions on the

[1] Due to time constraints, Music Claimants do not address every proposed finding of fact and conclusion of law submitted by the other claimants, but the absence of a reply to a proposed finding or conclusion does not signify Music Claimants' agreement with or endorsement of that finding or conclusion.

[2] Music Claimants abbreviate the following citations: "D.T." for written direct testimony, "R.T." for written rebuttal testimony, "Tr." for oral testimony, and "FF&CL" for Proposed Findings of Fact and Conclusions of Law. Music Claimants use the same abbreviations as in their Proposed Findings of Fact and Conclusions of Law to identify prior CRT and CARP decisions, as well as the other claimant groups in this proceeding.

shares to be awarded Program Suppliers, JSC, NAB and PTV. Some argue that circumstances have changed dramatically since the last CARP decision regarding 1990-1992 royalties. NAB FF&CL at 2; PTV FF&CL at 1. Others, notably JSC and Program Suppliers, are making claims similar to their prior positions using essentially the same methodologies, while trying to rehabilitate perceived weak points. JSC FF&CL at 1; Program Suppliers FF&CL at 149-152. Program Suppliers, with their Nielsen viewing study, and JSC, with its Bortz cable operator survey, present competing value methodologies that suggest vastly different allocations among the program types. Significantly, however, JSC and Program Suppliers have a confidential, long-term side agreement as to how to divide their shares, and an apparent agreement not to aggressively attack one another's evidence, as they have in the past. The existence of that agreement suggests that neither Nielsen nor Bortz is the absolute answer to distant signal valuations. Both PTV and NAB are seeking increases in excess of 100% of their traditional shares, but Program Suppliers and JSC see very little value in either category in the distant marketplace. JSC FF&CL at 58-59; Program Suppliers FF&CL at 235. The likelihood is that reality lies in between those extreme positions as well.

2. There is at least one area in which all the claimants appear to concur. The claimants agree that the Panel must determine the relative open market value of the different claimants' copyrighted property rights to the cable systems that retransmit programs in distant markets. Music FF&CL at 7; JSC FF&CL at 4-5; Program Suppliers FF&CL at 149; NAB FF&CL at 3; PTV FF&CL at 1; Canadian Claimants FF&CL at 2-5. In addition, the claimants apparently agree on the legal standard to be applied. The Panel should determine: (a) whether there are any "changed circumstances" since 1991-

1992 that warrant adjustment to the 1991-1992 awards; and (b) whether any claimant has established that prior CARP (or CRT) conclusions are incorrect. See, e.g., JSC FF&CL at 1-2; NAB FF&CL at 2.

3. There also seems to be general agreement that the Panel's task is difficult because the distant signal retransmission market is unique in that cable operators cannot insert advertising into distant signals. JSC FF&CL at 36-37; NAB FF&CL at 26, 66; PTV FF&CL at 5-6. The claimants also apparently agree that non-compensable programming under Section 111 (including Network programming[3]) must be excluded from any analysis of the value of the claimants' rights. JSC FF&CL at 5; Program Suppliers FF&CL at 15; NAB FF&CL at 121-25; PTV FF&CL at 38. Finally, the claimants seem to concur that in the relevant market, WGN – retransmission of which attracts the most subscribers and generates a large proportion of the royalties – is very significant. JSC FF&CL at 31, 175-77; Program Suppliers FF&CL at 152; NAB FF&CL at 85; PTV FF&CL at 13.

4. At the outset and throughout this case, Music Claimants have shown – and the other claimants agree – that music is a program element, not a program type, and therefore is difficult to evaluate. The Music Claimants do not, however, suggest or concede that the procedures, legal standards, factual context, and economic principles applicable to the valuation of the program types should be disregarded in the analysis of music's value. Nevertheless, the dramatic inconsistencies in the positions of the other claimants, who argue for a massive reduction in Music Claimants' share, suggest just

[3] As used herein, "Network" programming refers to the national programming appearing on ABC, NBC or CBS.

that. Underlying their cases is the unsupported premise that, in valuing Music's share, the Panel should apply legal standards and make assumptions that the claimants reject for purposes of determining their own shares.

5. In their direct cases, the other claimants each presented substantive evidence on the value of their programs, and in some cases, the other claimants' programs, but none used the same methodology to attempt to value music. With only one exception – NAB – the other claimants did not even reveal whether they were claiming a share net of an award to Music. None of the other claimants took a position on the appropriate share to be awarded to Music. The Panel, and Music Claimants, are now confronted with at least seven proposed alternative methodologies for calculating Music's share, each of which departs from prior precedent. The other claimants suggest that Music's share should reflect:

(1) the percentage of music license fees to total program expenses of the entire television broadcast industry (including television Networks) (JSC FF&CL at 33-35, 251-52; Program Suppliers FF&CL at 229; Canadian Claimants FF&CL at 42; PTV FF&CL at 70, 136);

(2) the percentage of music license fees to broadcast rights and music license fees of the entire television broadcast industry (including television Networks) (JSC FF&CL at 33-35, 251-52; Program Suppliers FF&CL at 229; Canadian Claimants FF&CL at 42; PTV FF&CL at 70, 136);

(3) the percentage of music license fees to program expenses of the entire basic cable network industry (JSC FF&CL at 33-35, 254-56; Program Suppliers FF&CL at 229; PTV FF&CL at 70, 136);

(4) the percentage of music license fees to the total gross revenue of the entire basic and premium cable network industry (NAB FF&CL at 152-54);

(5) the percentage of music license fees to the gross revenues of public television (PTV FF&CL at 70-71, 136-37);

(6) the percentage of music license fees to the program expenses of public television (PTV FF&CL at 70-71, 136-37); or

(7) the relationship between the music license fees for locally originated programming by cable operators and the revenue generated by local advertising in cable network programming (NAB FF&CL at 125-26).

6. These arguments range widely and are inconsistent with one another in many respects. They do, however, have certain things in common. None of the arguments were made in the direct phase of this proceeding – some were not even presented in the rebuttal phase and have been raised for the first time in FF&CL. All of the arguments involve calculations of expense data for television programming that is not compensable in this proceeding; some are based entirely upon expense figures for non-compensable programming. Perhaps most important, none of the claimants' proposals for Music is endorsed by its proponent as a proper method to measure the value of its own, or any other claimants' share, and none uses a methodology or data that has been accepted or offered to value Music in prior proceedings.

7. The accuracy of the CRT's observation in 1983, that music "admits of almost no possible precise formula to determine its marketplace value" (1983 Decision, 51 Fed. Reg. at 12,812) has been confirmed by the record in this proceeding. This Panel, however, should apply the legal standard established by the D.C. Circuit and determine Music's share based upon changed circumstances between 1983, the date of the last litigated Music award, and 1998-1999. Nat'l Ass'n. of Broads. v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985). The Music Claimants have demonstrated that music use was about the same on the top two stations (which together generated a large majority of the fees) between 1983 and 1991-1992 (Krupit R.T. at 2), and increased

overall approximately 11% between 1991-1992 and 1998-1999 (Boyle R.T. at 1-2).[4] The Music Claimants have also submitted qualitative evidence showing the increased value of music as part of the overall television viewing experience. Music FF&CL at 23-32. There is no evidence suggesting any decline in the quality or value of music to television audiences or to cable operators. Music Claimants should be awarded 5.0% of each of the three funds because the only demonstrable, relevant changed circumstance in the record of this proceeding is an overall increase in music use on programs retransmitted by cable system operators.

II. THE OTHER CLAIMANTS' ARGUMENTS THAT MUSIC'S SHARE SHOULD BE DRASTICALLY REDUCED FAIL TO SATISFY THE APPLICABLE LEGAL STANDARD.

8. The CARP should consider whether there have been "changed circumstances" since the last litigated awards, and determine whether any party has established that prior CRT or CARP "conclusions were incorrect." Nat'l Ass'n. of Broads., 772 F.2d at 932.[5]

9. Because Music's share was last litigated in 1983, application of the D.C. Circuit's standard to Music requires an analysis of whether there have been "changed circumstances" since 1983 or whether any party has established that the CRT's 1983 decision was incorrect. The 1983 decision involved an analysis of changed circumstances from the last allocation to Music in 1980 and, therefore, used the prior

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[4] Dr. Schink's rebuttal evidence is not contradictory. Music's 1989 credit study showed an increase in music use between 1983 and 1989, and Dr. Schink showed that 1989 average music use was similar to 1998-1999 music use. Schink R.T., App. B.

[5] JSC describes the second part of the legal test as requiring the CARP to determine "whether, on the record before it, the CARP's conclusions in the 1990-92 Proceeding were wrong . . . ." JSC FF&CL at 2.

awards to Music as a reasonable benchmark from which to measure changed circumstances. The 1983 decision set a new reasonable benchmark of 4.5% for Music, and stands on its own as a fixed reference point for the Panel's current task: to determine whether changed circumstances have occurred since 1983 that compel a change in Music's share.

10. The Music Claimants' case is a straightforward continuation of the CRT's approach. Music analyzed the relevant changed circumstances that would affect its award: change in music use. Lacking complete music use data for 1983, the Music Claimants presented quantitative evidence that:

(a) Overall music use in programs on distant signals increased 11% between 1991-1992 and 1998-1999 (Boyle R.T. at 1-2; Music Exs. 39A, 41A; Music FF&CL at 33-40);

(b) Overall music use increased about 7% between 1983 and 1989, with feature music increasing about 37% in that time frame (Schink R.T. at 12, App. C, Music Exhibit No. 22; Music FF&CL at 40); and

(c) Music use on WTBS and WGN remained stable between 1983 and 1991-1992 (Krupit R.T. at 2; Music FF&CL at 41), and increased 11% between 1983 and 1998-1999 (Krupit R.T. at 1-7; Music Exs. R-1, R-2, R-3; Boyle R.T. at 2-3; Music FF&CL at 41).

Music Claimants also presented testimonial and documentary evidence demonstrating that the use of music has qualitatively increased since 1983 (Music FF&CL at 23-32). This evidence of changed circumstances supports a modest increase in Music's allocation.

11. In discussing the legal standard that should apply to their own cases, the other claimants argued for continuity and consistency. For example, JSC stated: "none of the parties wants to make wholesale changes in the CRT and CARP precedent that has been established during more than two decades of tortuous and costly litigation." JSC

FF&CL at 2. JSC expressed the view that the system "would become completely unworkable if established precedent, upon which parties necessarily rely in negotiations and in developing litigation positions, were changed lightly." JSC FF&CL at 2. However, JSC abandoned this respect for precedent and concern for stability in the fervor to reduce Music's share.

12. JSC is the only claimant that presented testimony purporting to assign a value to music. The inconsistencies between JSC's case-in-chief and its case concerning Music Claimants' share are striking. JSC emphasized the importance of precedent in support of its direct case, citing the D.C. Circuit's decision requiring a showing of changed circumstances or proof that a prior decision was erroneous in order to change an allocation. JSC FF&CL at 1-2. JSC failed, however, to explain how its position on the proper measure of Music's share fits into this two-part legal standard. Unless the meaning of "changed circumstances" is distorted to include any argument for a radical change in a prior allocation based on new methodologies and data, JSC has not shown changed circumstances for the value of music.

13. Nor did JSC demonstrate that the 1983 CRT decision was erroneous. Instead, Dr. Schink testified that he followed the "general concept" that the CRT used in 1978 and 1979 (Schink R.T. at 14), and JSC maintained he "borrows heavily" from the CRT methodology (JSC FF&CL at 251). On the other hand, JSC acknowledges that Dr. Schink's methodology differs from CRT precedent and argues that Dr. Schink's calculations provide "a better picture of the marketplace as a whole," JSC FF&CL at 253, implying that the CRT was wrong in 1978 and 1979, and that Dr. Schink's methodologies and conclusions are preferable. The biggest differences, of course, are that Dr. Schink

included broadcast Network data, which the CRT excluded, and he did not use weighting to reduce significantly the impact of network affiliate stations, whereas the CRT did. Compare Schink R.T. at 14-17, with 1978 Decision, 45 Fed. Reg. at 63,042. In its direct case, JSC emphasized that "the CARP should determine the relative value of only the non-network distant signal programming that cable operators actually retransmitted during 1998 and 1999" (JSC FF&CL at 5) (emphasis in original), and argued that compensable Network affiliate station programming is "not material in attracting or retaining subscribers" because the vast majority of programming shown on Network affiliate stations is available from sources other than distant signals (JSC FF&CL at 191). But, in its music case, JSC argued that the expenses of Network programming (which is not compensable here), and cable network programming should form the basis for calculating Music's share. Id. The contradiction is irreconcilable.

14. In addition, JSC took inconsistent positions on the reliability of new methodologies. JSC criticized the Rosston study because it lacks "a long history" (compared to Bortz) (JSC FF&CL at 110), and because it produced considerably different results for 1998 and 1999. But, Dr. Schink's methodology was introduced for the first time in rebuttal, and contained no broadcast television data for 1999. Moreover, like the Fratrik and Johnson studies that JSC aggressively attacks, Dr. Schink's methods and conclusions cannot be harmonized with past awards. JSC argued eloquently in favor of prudence and care in adopting new methodologies and forcefully advocated the Bortz study on the basis of its stability over time, the intense scrutiny it has previously received, its focus on the "right question," and the improvements to which it has been subjected. JSC Opening Statement Tr. 98:18-105:8. However, in the rebuttal phase of the

proceeding, JSC presented an analysis that: (a) took the unprecedented step of including broadcast Network and cable network data; (b) could not be compared to earlier methods or awards; (c) ignored cable operators; (d) had not been carefully scrutinized and can probably never be replicated in future proceedings; and (e) included no broadcast television data for one of the two years in issue, 1999. Again, under the applicable standards endorsed by JSC, Dr. Schink's methodology is fatally flawed.

15. NAB's and PTV's variations on Dr. Schink's methods, in support of their own calculations, are even less tenable than Dr. Schink's analysis. First, no economic or other witness vouched for either of their approaches as a legitimate method for calculating Music Claimants' share. And, the NAB and PTV have not cured the defects – their calculations also included expenses for non-compensable programming, ignored the value to cable operators, and were not accompanied by any demonstration of stability over time or rational relationship to past awards to Music. NAB FF&CL at 45-50; PTV FF&CL at 41-42.

16. In an effort to address the applicable legal standard, NAB alleged that "new evidence" in the cable context "tends to show" that the CRT's award of 4.5% in 1983 was too high. NAB FF&CL at 152. However, NAB presented no testimony in support of this allegation, nor did NAB describe how Music's 1983 share should have been calculated. NAB advocated completely new methodologies for reducing Music's share (based on percentages of premium cable network gross revenue and cable system operator advertising revenue) that were not supported by any witness testimony in the hearings. NAB, thus, invites the Panel to find a prior CRT decision erroneous without

any evidentiary basis whatsoever. NAB clearly has not satisfied its burden of demonstrating that the 1983 CRT decision was wrong.

17. As JSC correctly observes, the system for allocating this royalty pool "would become completely unworkable if established precedent . . . were changed lightly." JSC FF&CL at 2. On the basis of this record, any significant departure from Music Claimants' prior allocations would ignore this sound principle.

III. THE OTHER CLAIMANTS' SUGGESTIONS THAT MUSIC'S ALLOCATION BE BASED ON RATIOS OF LICENSE FEES IN OTHER MARKETS ARE UNPERSUASIVE.

18. The other claimants calculated their own shares based upon analyses of television programming in the distant signal market itself – often taking great care to exclude programming not compensable in the distant signal market and to weight stations and/or programs based upon carriage in the distant signal market. See, e.g., NAB FF&CL at 225-30; PTV FF&CL at 69-71. They took pains to describe the peculiarities of the distant signal market, pointing out the absence of any prospect of advertising revenue, the enormous importance of WGN, the significance of the exit of WTBS, the non-compensability of Network programming, and the reduced significance of Network affiliates. JSC FF&CL at 1-3; NAB FF&CL at 2-4; PTV FF&CL at 1-2. What emerges from reading their cases is a highly unusual and atypical submarket; a market in which WGN – not ABC, CBS, or NBC – is by far the most significant participant; a market in which local news broadcasts are seen only outside the locality covered by the broadcast so that St. Louis residents can obtain up-to-the-minute information about rush hour commuting conditions in Detroit, and a market in which some 20% of the revenue is collected from cable operators who carry no distant signals at all. It is this highly atypical submarket that is surveyed by Bortz and Ringold, metered and tabulated by

Nielsen, measured by Fratrik and Johnson, and subjected to Rosston's regression analysis. And it is the decisions of cable operators, who decide which (if any) distant signals to carry, that are the focus of most of these studies.

19. But when it comes to valuing music, the other claimants suddenly abandon their precise analysis of the distant signal market. For example, JSC and NAB seek their own allocations based entirely on what cable operators would purportedly pay for compensable, distant signal programming. In stark contrast, they argue that Music's share should be determined by looking at the relative expenses of the entire broadcast industry – including Networks, the entire basic cable network industry, the entire premium cable network industry and total advertising revenues generated by cable operators (on all programming other than distant signal programming). In an attempt to lower Music's share, the other claimants have analyzed the compensation paid to Music in virtually every television context except on distant signals.

20. These comparisons fail for the same reasons the other claimants reject them as a basis for valuing their own shares: the differences between the distant signal market and other broadcast television and cable markets are both numerous and fundamental. The other claimants correctly observed for their own cases that the distant signal market is unique, peculiar, and atypical. Most importantly, although there is established precedent that certain claimants' programming is less valuable when carried as a distant signal (e.g., local news, duplicative PBS programming, out-of-market sports), there is no evidence in the record to suggest that the right to use all of the music in all programs on a channel is less valuable in the distant signal market. Accordingly, relative

to other copyrighted programming, Music has a greater value in the distant signal marketplace.[6]

21. The differences between the distant signal market and other broadcast and cable television markets illustrate why the other claimants have been careful to base data supporting their shares on the distant signal market itself. The other claimants' failure to apply this insight to the determination of Music's share renders their comparisons fatally defective.

A. Comparisons of Music Fees and Other Expenses in Other Markets Fail to Reflect the Value of Music in Relevant Programming in the Relevant Market.

22. Each other claimant group has adopted (NAB and PTV have added their own variations) the conclusions drawn by Dr. Schink, based on his comparison of music license fees with the broadcast rights and other expenses incurred by all the commercial television broadcasters and the cable networks. PS FF&CL at 225; JSC FF&CL at 33-35; NAB FF&CL at 126-29; PTV FF&CL at 135; Canadian Claimants FF&CL at 41-42. However, none of the claimants has suggested that its share could be calculated using Dr. Schink's methodology or data. In fact, Dr. Schink's methods do not measure the relative value of music, or any other claimants' programming, to cable system operators.

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[6] No party has shown that in the open market, the relationship between music license fees and other copyright expenses incurred by cable operators would be the same, or even similar to the relationship between music license fees and other program expenses in broadcast or cable television. Music Claimants acknowledge that the CRT considered the broadcast station analogy in 1978 and 1979, but it was not rigidly followed in 1980, and not considered at all in 1983. And, as a practical matter, while one can calculate the ratio of music fees to other expenses in other television contexts, there is no evidence that in the unregulated market, music license fees and other program expenses are dependent on or related to one another in any respect.

23. To the degree that the other claimants propose that this royalty pool be divided based upon an analysis of the economics of another market, they ignore the unique characteristics of this royalty pool. Unlike the "broadcast industry in the aggregate" or the entire cable network industry, this royalty pool reflects only some payments received for the secondary transmission of the relevant programming. The programming on distant signals is initially created or licensed, produced, organized, assembled, and scheduled by local television stations for local transmission. Revenue is earned on such programming primarily through local advertising, so the expenses associated with such programming are offset before the programming even appears on distant signals. A division of the royalty pool generated by payments for these distant signals based on the revenue and/or costs of an entire industry is problematic, misleading and inapposite.

24. One example of the problems associated with any program expense model is the cost of local news programming, as compared to its value in an unregulated distant signal market. Local news programming represents a large portion of the programming expense incurred by local television stations and, thus, a big part of the economics of the broadcast industry as a whole. It also is carried to a significant extent on distant signals. Yet, by its very nature, such programming is produced primarily because of its value in the local market, and prior CRT and CARP decisions concerning NAB's share show that its value in attracting and retaining subscribers in the distant signal market is limited.

25. Furthermore, not just Music, but every claimant in this proceeding is entitled to the relative value of only the public performance rights in their compensable,

retransmitted programs.[7] The cost to the cable operator to license the programs tends to be much lower than the amount the original broadcaster spent to select or create, produce, and assemble programs on the entire channel for every day of the programming year. The original broadcaster incurs numerous program expenses to air programs in the first place, including "Payroll for Employees Considered 'Talent,'" "Payroll for Other Program Employees," "Rental and Amortization of Film and Tape," "Records and Transcriptions," "Cost of Outside News Services," "Payments for Talent," "Other Performance and Program Rights," and "All Other Program Expenses." Schink R.T. at App. E-3. As Dr. Schink noted, the high production costs of sports events (including play-by-play announcers and color commentary), cameramen, and road crews are all among "other program expenses" that the broadcasters incur. Dr. Schink compares these costs to music license fees, but does not use these costs to calculate the relative value of any other claimant group.[8] Schink Tr. 8770-71. It is inappropriate to compare broadcast or cable music license fees to these many expenses that the cable operators simply would not incur.

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[7] Only Canadian Claimants recited as "fact" Dr. Schink's suggestion that Music Claimants are somehow entitled to less than full credit for the value music brings to programming, because Music does not represent the contributions of musicians, vocalists, sound engineers, etc. Canadian Claimants FF&CL at 41 (citing Schink R.T. at 9 n.9). Even Dr. Schink acknowledged that there is no performance right under the copyright law for those contributions, as valuable as they unquestionably are. Schink Tr. 8502:13-18. The performance right for all copyrighted music in distant signal retransmissions belongs to the Music Claimants' members and affiliates, and the share to Music should reflect that whole value.

[8] Although the broadcasters incur many expenses to select, produce and compile the programs, they receive no share in these proceedings for the value of those contributions to the programming owned by others.

26. Consequently, the very same programming may have a different cost and/or a different value on a distant signal than the programming has locally or in the aggregate. Most of the analyses the other claimants provide to calculate their own shares take this into account – not only by limiting their analysis to the programming that actually appears on distant signals but also by focusing that analysis on the value of that programming solely in the distant signal market. Thus, the Bortz and Ringold studies survey cable operators who decide to carry distant signals, not local broadcasters who selected the programming in the first place. Trautman Tr. 212; Canadian Claimants FF&CL at 32-36. Similarly, the Program Suppliers' Nielsen study measures only the viewing of programming as a distant signal (Program Suppliers FF&CL at 37-39), and the Rosston study also focuses on decisions of cable operators to carry distant signals (NAB FF&CL at 51-53). The other claimants depart from these analyses with respect to music by comparing this royalty pool with the economics of the entire broadcast television or cable industry.

27. Another problem with the other claimants' analyses is that they ignore compensation already received for use of their programs on distant signals. PTV fundraising drives are retransmitted, and presumably some distant viewers make contributions. There is evidence that sports programming on distant signals generates additional advertising revenue which results in higher license fees paid for such programming. See, e.g., Chicago Prof'l Sports Ltd. P'ship v. WGN Continental Broad. Co., No. 90 C 6247, 1995 U.S. Dist. LEXIS 12609, at *3-7, 24 (N.D. Ill. Aug. 30, 1995),

rev'd on other grounds 95 F.3d 593 (7th Cir. 1996) (Music Ex. 5 RX).[9] Similar evidence pertains to Program Suppliers. Winkelman Tr. 6337:12-6343:11; Green Tr. 6778:13-6779:20. There is also evidence that broadcasters benefit from the increased audience that distant signal carriage provides to their programming. JSC FF&CL at 192 ("NAB members do stand to benefit from distant carriage and would have to take such benefit into account if they had to negotiate in the marketplace with cable operators."). As a result, public television, sports, movies and syndicated, and locally-produced programming likely are able to receive higher license fees from the broadcasters by virtue of distant signal carriage. Any comparison of total broadcast rights payments in another market (broadcasting or cable networks) to total broadcast rights payments for distant signal programming would necessarily have to include an offset for the payments made to, or benefits received by copyright owners for use of their programs. Indeed, the Panel should be mindful, in allocating the shares, that a number of claimants have already received some compensation for the distant retransmission of their programming in 1998 and 1999, but Music Claimants have not been compensated at all for their rights on distant signals. Thus, in a hypothetical open market, the Music Claimants could expect to receive a greater relative increase over compulsory license fees than the claimants whose works have already generated income to them from use on distant signals.

[9] The 7th Circuit did not question the lower court's finding that Chicago Bulls games generated, and benefited from, some amount of additional revenues on distant signals. Chicago Prof'l Sports Ltd. P'ship, 95 F.3d at 595 ("the large audience makes WGN attractive to the Bulls").

B. The Distant Signal Market Is Unique and Not Directly Comparable to Aggregate Broadcast Markets.

28. Instead of attempting to focus its analysis on the value of music in compensable programming on distant signals in the distant signal market, JSC presented a comparison of music license fees to other expenses of the entire commercial television broadcast industry. In justifying this approach, JSC implies that the CRT was wrong in 1978, 1979, 1980, and 1983 and that Dr. Schink's methodology is preferable, because it looks at "broadcast television in the aggregate" and "gives a better picture of the marketplace as a whole" JSC FF&CL at 253. But the marketplace for programs and their music retransmitted on distant signals is clearly not the same as "broadcast television in the aggregate" and is demonstrably different from "the marketplace as a whole."

29. Of course, one enormous difference is that the cable systems pay no royalties for Network programming, and those programs are not compensated in this proceeding. In contrast, in the world of "broadcast television in the aggregate," Network programming is extremely important and very expensive. This is particularly significant in this proceeding because music license fees, as a percentage of program expenses or broadcast rights, are much different for the Networks than for stations only. Music Ex. 2 RX. Although it is impossible to precisely quantify the impact of Dr. Schink's decision to include Network data, the Music Claimants demonstrated on cross-examination of Dr. Schink that, if the 1980 ratios of Network and local station expenses were applied to

1998, the exclusion of Network data would roughly triple Dr. Schink's calculations of Music's relative compensation.[10]

30. Moreover, a comparison of only the local broadcast stations demonstrates clear differences between these markets. The primary broadcast market is one where network affiliates have great value. A Superstation (such as WGN) comprises only a small fraction of the value of all local stations in the primary broadcast market. Its share of overall expenses and license fees are comparatively small. Here, however, royalties paid for carriage of WGN account for nearly 50% of the total royalty pool, while all Network affiliates combined account for less than 10%. Accordingly, despite the similarity of programming, direct comparisons between the primary broadcast market and the retransmission markets are misleading.

31. In addition, the fundamental economics of "broadcast television in the aggregate" are based upon the sale of advertising. The record is clear that broadcast stations earn virtually all of their revenues from advertising. Carey Tr. 7013:16-7014:10, 7081:20-7082:8. Therefore, the value of programs (or anything else) to broadcasters is generally dependent upon its ability to generate advertising revenue.

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[10] As for Music Claimants' NAB Data rebuttal evidence (Music Exs. 3 RX, 4 RX), Dr. Schink's criticism of the NAB Data for failing to include Fox, WB and UPN Network expenses is counterbalanced by the failure of the interim ASCAP station rates in 1998 and 1999 to account for Fox, WB and UPN Network revenues. Moreover, there were program syndicators that furnished programs to independent stations during the 1978-80 years and that were not licensed by ASCAP and BMI. They similarly had expenses for program production on a barter basis, and those expenses were not considered by the CRT when evaluating stations' music license fees. In view of this, considering unlicensed networks' expenses in the 1998-99 period makes for an invalid comparison to the prior CRT decisions.

32. In contrast, cable system operators earn most of their revenues from subscribers and only a very small portion of their revenues (about 5%) from advertising. Green Tr. 6770:21-6771:11; Carey Tr. 7017:4-7019:10; Lindstrom Tr. 7185:9-10; Gruen Tr. 7674:21-7675:7. And, none of those advertising revenues are earned on distant signals, and would not be earned in a hypothetical marketplace either, unless a different regulatory scheme were in place. Whereas cable systems can insert their own advertising in certain other programming, they cannot insert their own advertising into distant signals. Carey Tr. 6897:22-6898:7; Gruen Tr. 7674:15-20, 7697:6-11; Ducey Tr. 8805:11-15.

33. Another important difference is that broadcast stations purchase or license individual programs, which they assemble on their channels. Carey Tr. 7020:11-16. As a result, broadcast stations have established a real-world market of copyright payments to producers of individual programs (and they have to incur additional expenses to produce sports programs, for example, and select and assemble full programming days for the whole year).

34. In contrast, cable systems purchase pre-assembled channels, not individual programs. Carey Tr. 7021:11-7022:1. Cable systems have little to no experience in purchasing individual programs. Green Tr. 6763:3-20, 6764:13-22. If there were no compulsory license, the cable system might not purchase individual programs, but rather entire signals, which are packages of programs.

35. As a result of these differences, several of the claimants have argued that cable systems have very different business models from broadcasters. Carey Tr. 6892:12-6893:7; Ducey Tr. 8805:4-11; PTV FF&CL at 5-10. They contend that cable

systems are focused on attracting and retaining subscribers, whereas broadcasters seek to maximize their advertising revenues. Carey Tr. 7022:6-7023:9, 7024:9-18. The market for distant signal programming by cable systems is simply not comparable to the real-world market for individual programs by broadcasters. Ducey Tr. 8805:4-8806:3.

C. Comparisons with Cable Networks Are Also Inappropriate.

36. Basic cable networks now derive more than half of their revenue from advertising. PTV FF&CL at 9. Not surprisingly, their perspective on the value of various types and elements of programming is also largely influenced by their ability to attract advertising dollars.

37. Perhaps sensing the problems inherent in comparisons with markets whose economics are driven by advertising, the NAB has, in its FF&CL, proposed, for the first time using premium cable networks for a comparison. Aside from the fact that no witness testified that this comparison is appropriate and that, therefore, there is no record evidence to support a finding of fact that it should be used, the comparison with premium cable networks is unsuitable. A comparison with the gross revenue of such networks is particularly inapt because such revenue includes other costs (transmission, sales, administration and marketing) as well as a substantial profit margin. It is certainly not comparable to the limited pool of copyright royalties at issue here.

38. Because the market for distant signals is unique, negotiations for music license fees would not use other segments of the television industry as a benchmark, but rather would be based on Music Claimants' litigated and settled shares under the cable compulsory license.

IV. THE OTHER CLAIMANTS' ATTEMPTS TO REDUCE DRASTICALLY MUSIC CLAIMANTS' SHARE ARE INCONSISTENT AND LOGICALLY FLAWED AND MUST BE REJECTED.

A. NAB's Proposal for Music's Share is Severely Flawed.

1. NAB's Proposal That Music Be Awarded a Share Equal to Its Percentage of Gross Revenue of Cable Networks

39. In an attempt to minimize the Music Claimants' share, NAB proposes that the Panel decrease Music's share by 80% and award Music only 0.9% of the cable royalty funds, a share equal to the estimated percentage of gross revenues paid to the performing rights organizations by the cable networks and premium cable channels. NAB FF&CL at 152-53. This "methodology" has never previously been asserted, much less adopted, in any prior CRT or CARP proceeding, and it has not been proposed by any other claimant in this proceeding. It was not proposed by NAB until after the close of the hearing record in this proceeding. The Panel should summarily reject NAB's proposal for these and the following reasons.

40. First, NAB presented no economist or other witness to testify that Music's share of the cable royalty fund should mirror the percentage of gross revenues that the cable industry pays to the performing rights organizations. NAB's failure to introduce any witness supporting its theory for determining Music's share is fatal to its argument. This failure, among other things, deprived the Music Claimants (as well as the Panel) of the opportunity to scrutinize the proposed methodology through cross-examination or rebuttal testimony. It would be arbitrary and capricious for the Panel to adopt an economic valuation methodology that was not endorsed, or even discussed, by any witness in the proceeding, much less the twenty years of CRT/CARP precedent.

41. Second, NAB's claim rests entirely on the erroneous assertion that "the 'gross revenues' of the distant signals carried by cable systems . . . would be [equivalent to] the royalty funds paid by cable operators to carry distant signals." NAB FF&CL at 153. The most obvious flaw in this claim is that while the entire cable royalty fund is allocated among the various claimant groups as license fees, a large percentage of the cable networks' gross revenues are not paid to the claimants in this proceeding. That is, if one were to calculate the percentage of a cable network's gross revenues paid to each of the claimant groups in this proceeding for their copyrighted works, the total would be substantially below 100% of its revenues. Cable networks generate substantial profits, over and above their total expenses. See generally Schink R.T. App. H. This profit is not allocated in the open market to any of the claimant groups in this proceeding, and would have to be excluded (along with any other non-copyright revenues and expenses) from the gross revenues figure as part of any re-calculation of Music's share of royalties. As a result, Music's share of gross revenues cannot be used to determine relative valuation between the claimants in this proceeding concerning copyright royalties.

42. Third, the CRT implicitly rejected the concept underlying NAB's proposal when it analyzed Music's share, in part, based on an analysis of music license fees as a percentage of program expenses. In the 1978, 1979 and 1980 proceedings, the CRT could have fashioned Music's award following the "total revenue" approach the NAB advocates here. The CRT had evidence of music license fees and broadcast television revenues. Nevertheless, the CRT rejected that methodology and instead decided to consider music license fees as a percentage of only program expenses, and did not

consider other non-programming expenses unrelated to compensable, copyrighted works.[11]

43. Moreover, the interim cable rates[12] upon which NAB bases its proposed 0.9% share were established by a U.S. Magistrate Judge in 1989, six years prior to the 1990-1992 cable distribution settlement between Music and the other claimants (which occurred in 1995). United States v. Am. Soc'y Composers, Authors & Publishers (Application of Turner Broad. Sys., Inc.), Civ. No. 13-95 (WCC), 1989 U.S. Dist. LEXIS 13154 (Oct. 12, 1989) (NAB Demo 12). If NAB truly believed that the Magistrate's decision meant that Music should receive 80% (or approximately $18 million) less than the proposed settlement, it is difficult to believe that NAB (or any other claimant) would have settled with Music for 4.5% of the 1990-1992 funds.

44. Finally, NAB's position regarding Music is inconsistent with the position it advocates for its own share, where NAB flatly rejects an analogy to the cable marketplace, stating that "the cable television marketplace operates under fundamentally different dynamics than the broadcast market." NAB FF&CL at 25 (citing Egan Tr. 1317-19; Carey Tr. 7013-25). NAB goes on to catalog the differences between the economics that motivate cable operators retransmitting distant signals, from those of the television stations and networks and the cable networks. NAB FF&CL at 25-28. But

[11] Contrary to NAB's assertion that it relies on new evidence since the 1983 proceeding, the music license fees paid by the local broadcast stations' and their total revenues were available to the CRT in the 1978, 1979 and 1980 proceedings.

[12] We again note the problem of using interim rates to determine Music's share in this proceeding.

when it comes to the supposed marketplace value of music, NAB claims that broadcast and cable are "analogous markets." NAB FF&CL at 121-122.

45. Flawed in theory and inconsistent in application, NAB's valuation methodology is a thirteenth-hour attempt to slash Music's share – by an unprecedented 80% – in order to counter-balance NAB's request to nearly double its own share. The Panel should summarily reject it.

2. NAB's Comparison of Music License Fees to Cable Operator Advertising Revenues

46. NAB also attempts to diffuse the significant fact that ASCAP and BMI collectively received approximately $10 million in each of 1998 and 1999 from cable operators solely for the use of music on public access, educational and governmental channels, as well as locally originated advertising (the "NCTA Agreements"), by pointing out that such fees represent only 0.4% of the revenues generated by locally inserted cable advertising.[13] NAB FF&CL at 126, 154. NAB offers no testimony or other explanation as to how this figure can be used to determine the relative value of Music in this proceeding.

47. However, the fees paid to ASCAP and BMI under the NCTA Agreements are relevant as the only evidence in the record of the value that cable operators directly place on music. In determining the relative value of the differing claimant categories, it is significant that cable operators have recognized the value of music performing rights even separated from the mainstream copyrighted programming of each of the claimants

[13] The figure is 0.6% (50% higher) if the local advertising number used is from 1998 – as opposed to 1999, which NAB's counsel used in his cross-examination. NAB Ex. 41 RX for impeachment. The Panel should not base an award in this proceeding upon impeachment evidence.

in this proceeding. Most importantly, it is also an open market sanity check on the 5% share award proposed by Music. By contrast, the awards proposed by NAB, PTV and the other claimant groups suggest that the music contained in all of the programming carried on station retransmitted as distant signals (e.g., concerts, hit movies, Super Bowl Halftime Show) is far less valuable in dollar terms than the music covered by the NCTA Agreements (public, educational and governmental channels, leased access channels, and local advertisements).

48. Significantly, NAB presented no witness to proffer its novel theories.

B. PTV's Reliance on the Section 118 Proceeding

49. In an attempt to bolster its claimed increase of approximately 150%, PTV proposed in its FF&CL that Music receive a total share between 0.3% and 2.3%. PTV FF&CL at 69-71, 135-37. However, PTV made virtually no effort to explain how the cited evidence supports an award to Music of less than 2.3%. There is a good reason for this. PTV presented no independent evidence that would provide the Panel with a basis for determining Music's share of the cable royalty fund. PTV's evidence addressed only the question of any differential allocation of Music's share among the other claimants. As regards evidence of Music's overall share, PTV merely echoes the flawed calculations of Dr. Schink, to conclude that Music should receive a maximum share of 2.3%. PTV FF&CL at 70.

50. Like NAB, PTV applied a double standard, eschewing broadcast television as the proper focus to evaluate its own programming while advocating that the Panel follow Dr. Schink's methodology based upon the entire broadcast industry to value Music. Indeed, PTV argued that: (a) "[b]ecause a cable operator depends on subscriptions to a range of program channels and not advertising, it will value

programming differently than a broadcast station or broadcast network that is solely dependent on advertising revenues generated by a single channel of programs." (PTV FF&CL at 7); (b) "a comparison of relative cable network license fees does not necessarily present a true picture of relative value because one must take into account relative advertising revenue. (PTV FF&CL at 8 (citing Trautman Tr. 369-71)); and (c) the "payments" made by broadcasters to program syndicators for broadcast rights are often in the form of barter, not cash, in the form of shared advertising time and revenue (PTV FF&CL at 11). Yet PTV nonetheless adopted Dr. Schink's view that the "best method" for determining Music's share is to compare music license fees to total broadcast television programming expenses and cable network programming expenses. PTV FF&CL at 136. These contrary positions simply cannot be reconciled.

51. Aside from Dr. Schink, PTV's only Music-related evidence is a series of calculations made from data in the 1996 non-commercial broadcasting rate adjustment ("NCBRA Proceeding"). In that proceeding, the Public Broadcasters[14] were ordered to pay ASCAP and BMI annual blanket license fees totaling $5,443,000. NCBRA Decision, 63 Fed. Reg. at 49,826. Using data from the NCBRA Proceeding, PTV asserted that public broadcasting's music license fees amount to approximately 0.26% of its total average annual revenues, and 0.44% of its private (non-governmental) revenues. PTV FF&CL at 137. Similarly, PTV argued that public broadcasting's music license fee as a percentage of its program expenses is approximately 0.6%. Id.

[14] The Public Broadcasters in the Section 118 Proceeding consisted of the Public Broadcasting System, NPR and other public broadcasting entities as defined in 37 C.F.R. § 253.2.

52. However, the data from the Section 118 rate proceeding is irrelevant to the assessment of Music's share in a cable distribution proceeding. First, the NCBRA Proceeding did not involve distant signal carriage of PBS and provides no information concerning the valuation of music on PBS by cable operators. See generally 17 U.S.C. §118; NCBRA Decision. Second, the NCBRA Proceeding covered a different market – the non-commercial television market – than this proceeding. Accordingly, it cannot form the basis for Music's award from the cable fund, which is overwhelming composed of royalties paid for carriage of commercial distant signals. Indeed, the public broadcasters forcefully argued in the NCBRA Proceeding that a comparison between the commercial world and the noncommercial world cannot be made. Third, to the extent that PTV suggests that its "revenues" (public or private) may be used as a share allocation tool, it makes the same mistake as NAB, supra. A large percentage of PTV's revenues are not associated with copyrighted programming, but rather include a variety of non-programming costs (e.g., personnel, promotion and operating expenses), a percentage of which is not properly allocable to any party in this proceeding.

53. Moreover, PTV's assertion that its music license fees are a smaller percentage of its programming expenses than the percentage paid by commercial television reveals the fundamental flaw in using the program expense methodology to determine the relative value of music in this proceeding. There is absolutely no evidence in the record that cable operators value the music on PBS any differently than the music

on commercial television.[15] Yet, the evidence shows that, as a percentage of programming expenses, PBS pays less than half the music license fees as commercial television. Compare Wilson R.T. at 4, with Schink R.T. at 14-17. In light of the absence of evidence of any valuation difference (between music on commercial and non-commercial stations) by cable operators, the NCBRA data strongly suggests that the Panel should ignore the "music license fees to programming expenses" model as not indicative of relative value on distant signals.

54. Finally, the NCBRA Proceeding is a persuasive authority for the methodology proposed by the Music Claimants and followed by the ASCAP Rate Court – beginning with a benchmark rate and adjusting for changes in music use and revenues. In the NCBRA Proceeding, PBS itself presented a music use study that showed a flat trend of total music use on the PBS National Feed from 1992 to 1996.[16] Wilson R.T. at 5. Because no adjustment to the rate was dictated by an increase or decrease in total music use, the CARP in the NCBRA Proceeding determined the rate by taking the ASCAP fee paid by public broadcasters in 1978 and trending it forward to 1996, adjusting only for the change in the public broadcasters' total revenues and ASCAP's relative share of music compared to BMI. NCBRA Decision at 49,826. Accordingly, as

[15] Indeed, to the extent that PBS offers unique music-intensive programming, such as *Great Performances* and other concert series, there is evidence that cable operators may value the music on PBS more highly than on commercial television taken as a whole.

[16] The PBS National Feed comprises only a portion of the PTV programming; individual PTV stations add other, non-PBS programming to fill out their schedules. PTV FF&CL FF&CL at 72-73. The PBS music use study in the NCBRA proceeding was limited to the music on the PBS National Feed. NCBRA Decision, Panel Report at 18-19. ASCAP's music use study in that proceeding, however, measured music on the actual stations and showed an increase in use of ASCAP music during that period. NCBRA Decision, Panel

a percentage of revenues, music license fees for PTV remained constant during the 1978 to 1996 time period. This constant rate on PTV suggests that (at least with respect to PTV) Music's relative value was unchanged and belies PTV's unsupported assertion that Music's relative valuation has decreased by 50-90% during that time-period.

C. JSC's Evidence of Broadcast Stations and Cable Networks

55. The Bortz study, relied on so heavily by JSC, does not measure music at all. JSC FF&CL at 33. Furthermore, the credence given to the Bortz study in the 1990-1992 Proceeding did not apply to music because Music Claimants were not part of the Proceeding.

56. As shown in Music's FF&CL, Dr. Schink's evidence should not be relied on by the Panel. Although Dr. Schink claimed that he followed the "general concept" of the approach of the CRT in 1978 and 1979, he did not follow the methodology with sufficient accuracy or consistency to render his opinions and conclusions useful in this proceeding. Music FF&CL at 46-56. Dr. Schink improperly combined Network and station expenses, failed to make the necessary weighting adjustments to reflect the low significance of the Network affiliates, made arbitrary assumptions in estimating 1998 programming expenses, presented no broadcast data for 1999, and did not consider any of the other evidence in this proceeding regarding music use. Id. He did not make any adjustments at all to the formulaic approach he suggests, although the CRT in 1980 clearly indicated its disfavor of any attempt to calculate Music's share using a strict formula or calculation. 1980 Decision, 48 Fed. Reg. at 9566 ("The Tribunal in various

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Report at 14 n.19. This supports Music's study in this case, which likewise measured actual music use on the relevant retransmitted stations.

proceedings has expressed its major reservations about the use of formulas."). Finally, Dr. Schink, who criticized the music use study as not showing the value of music relative to other claimants' copyright rights, did not attempt to use his methodology to calculate any other claimants' share.

57. Dr. Schink failed to follow the methodology taken by the CRT in 1978 and 1979.[17] However, if an attempt at replicating the CRT's calculations could be made from the record evidence,[18] the result would show no change in circumstances from 1983 through 1998. The FCC data used by Dr. Schink show that in 1980, the stations paid 89.65% of the music license fees (compared to the networks' 10.35%), and the stations paid only 22.71% of the sum of "rental and amortization of file and tape" and "other

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[17] Dr. Schink's eleventh-hour estimate of a 2.14% music license fee to non-network programming expense ratio (his attempt "to back out network programming" from his calculations (Schink Tr. 8771:5)), should be disregarded by this Panel. Dr. Schink's data, methods and calculations were not contained in his written testimony, were not previously disclosed to the other parties, and there was no opportunity for proper cross-examination, much less discovery. He claims to have relied on, among other things, Mr. Reimer's testimony concerning Network license fees paid to ASCAP for the period ending in 1996 (see JSC Ex. 37X), and a mystery "number for network programming that was put out in a Kagan publication" for 1999, which is nowhere in the record. Dr. Schink apparently ignored Dr. Boyle's testimony that the industry-wide interim license fee for local television was about $96.4 million in 1998. Boyle Tr. 4587-4588. Dr. Schink testified: "I am going to take total minus a slightly too high number for networks. I get a slightly too low number for program expenses for non-network. And I divide it by a high estimate, roughly high estimate, for non-network license fees. That ratio is 2.14 percent. So that was how I arrived at that number." Schink Tr. 8771-8772. To accord any weight at all to this unwritten, unsupported, last-minute testimony would be serious error.

[18] As discussed in Music's FF&CL, such an exercise is not appropriate in this proceeding. The CRT abandoned the calculation as a factor in Music's award, in part because interim fees were not reliable. ASCAP's local station music license fees are, similarly, interim for 1998 and 1999. Boyle Tr. 4588. Accordingly, a proper calculation cannot be made.

performance and program rights," while the networks paid 77.29%.[19] Schink R.T. at App. E-3; Music Exs. 1 RX, 2 RX. As set forth in Music's FF&CL, Music Claimants demonstrated through the NAB Data that Music's share of broadcast rights payments on Independent stations (i.e., non-affiliated with ABC, CBS or NBC) amounted to 5% in 1998 and has not declined over time.[20] Music FF&CL at 52-53.

58. Ultimately, Dr. Schink's theories and calculations are unpersuasive because they are incorrect, have been misapplied, and cannot support any conclusion concerning Music's proper share. The only relevant evidence of changed circumstances shows that: (a) overall music use in programs on distant signals increased 11% between 1991-1992 and 1998-1999 (Boyle R.T. at 1-2; Music Exs. 39A, 41A; Music FF&CL at 33-40); (b) overall music use increased about 7% between 1983 and 1989, with feature music increasing about 37% in that time frame (Schink R.T. at 12, App. C, Music Exhibit

[19] In addition, for 1990-1998, Dr. Schink relied on the Census Data contained in Appendix F, which actually has a listed line item called "Broadcast rights." Schink R.T. at App. F-17. In contrast, his 1980 figures are based on the 1980 FCC Data in Appendix E, for which he added "rental and amortization of file and tape" to "other performance and program rights" to define "broadcast rights." The Census Data "Broadcast rights," might or might not be equivalent or comparable to the sum of what the FCC called "rental and amortization of file and tape" and "other performance and program rights" in 1980.

[20] As set forth in Music's FF&CL and below, any comparison to, or replication of, the CRT's calculations in 1978 and 1979 would have to focus only on the Independent stations, as the necessary weighting of the Network affiliates all but eliminates their significance. As shown, comparing the music fee/program expense ratio of Independent stations shows no decrease between 1980 and 1998 regardless of which programming expenses categories are analyzed. Moreover, Dr. Schink's criticism of the NAB Data (Music Exs. 3 RX, 4 RX), for failing to include Fox, WB and UPN network expenses is counterbalanced by the failure of the interim station rates in 1998 and 1999 to account for Fox, WB and UPN network revenues.

No. 22; Music FF&CL at 40); and (c) music use on WTBS and WGN remained stable between 1983 and 1991-1992 (Krupit R.T. at 2; Music FF&CL at 41), and increased 11% between 1983 and 1998-1999 (Krupit R.T. at 1-7; Music Exs. R-1, R-2, R-3; Boyle R.T. at 2-3; Music FF&CL at 41).

D. Program Suppliers' Proposed Findings and Conclusions

59. Program Suppliers argue, echoing the testimony of Dr. Schink (a JSC witness), that evidence of actual marketplace transactions supports a reduction in Music's share. Program Suppliers FF&CL at 229. Program Suppliers presented no independent evidence, not even in the context of the Syndex Fund which they share solely with Music Claimants. Program Suppliers argue that only the Nielsen Viewing Studies present data of actual programming popularity that is relevant to the decision-making of the Panel in this proceeding. Program Suppliers FF&CL at 156. But Nielsen, which Program Suppliers argue should serve as the "anchor" for the awards in this proceeding (Program Suppliers FF&CL at 156), does not measure music (making it similar to the Bortz Study and the NAB Regression analysis).

60. For the reasons set forth above, Dr. Schink's testimony is not a sufficient or reliable open-market basis for reducing Music Claimants' share.

V. THE OTHER CLAIMANTS' CRITICISMS OF THE MUSIC USE STUDY ARE NOT PERSUASIVE.

61. The other claimants criticize the music use study conducted by Dr. Peter Boyle and Frank Krupit, reciting a number of minor "problems" with the study that allegedly render it an inappropriate support for determining Music's share. Of course, the other claimants also pick apart the defects and weaknesses of all of the other claimants' quantitative evidence, unless (and sometimes even if) it happens to support a

higher share for them.[21] Only JSC and Program Suppliers, the two groups that historically receive the bulk of the royalties, did not seriously challenge each other's evidence – apparently as a result of their prior agreement. JSC FF&CL at 4 n.1.

62. All of the other claimants suggest a drastic reduction in Music's share. At the same time, they do not dispute that they all use music to enhance their programming, and almost 50% of all program minutes retransmitted on distant signals in 1998 and 1999 contained Music Claimants' music (about 22 minutes of music in about 45 minutes of programming per hour).[22] And the evidence presented by Music Claimants demonstrates the reason for the widespread use of music: music makes the programs more interesting, exciting, moving, frightening, or humorous. Music also demonstrated, through unchallenged testimony, video and documentary evidence, that music was used more, and more conspicuously, in movies and television programming retransmitted on distant

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[21] E.g., Canadian Claimants FF&CL at 37-41 (detailing why the Bortz, Rosston, and Nielsen studies do not properly measure value of Canadian Claimants programming); Program Suppliers FF&CL 191-208 (criticizing NAB regression analysis), 221-24 (criticizing Fairley's adjustments to Bortz); NAB FF&CL at 46-51 (relying on Bortz to corroborate NAB's position), 66-76, 143 (criticizing Dr. Gruen's study); PTV FF&CL 38-45, 135-36 (supportive of Bortz, provided results are adjusted to "correct for the major biases" against PTV). JSC takes the position that the Bortz study assigns the absolute correct share to JSC (even though Mr. Egan, their cable operator witness would overcredit sports for programs that are not owned by JSC. Egan Tr. 1395:14-19.). Interestingly, however, JSC takes the position that Bortz overvalues NAB's and PTV's share, because it fails to take into account the "seller's side" of the evaluation, pointing out (correctly) that in order to increase carriage, both NAB and PTV would sell their programming for less than cable systems would be willing to pay. JSC FF&CL at 120, 191-99, 216-18.

[22] The other 15 minutes or so of each hour are commercial advertisements, which generally contain wall-to-wall music. Saltzman Tr. 3993:10-13. Music Claimants do not directly quantify the music in commercials for purposes of seeking compensation in this proceeding for the music in commercials, but the Panel should take into account that in an unregulated market, the cable systems – like every other broadcaster – would have to pay for all music in commercials.

signals in 1998-1999, than in either 1991-1992 or 1983. Saltzman D.T. at 10-16; Walden D.T. at 2-10; Lyons D.T. at 3-22; Music Exs. 1, 2, 5-7, 8-12, 16, 20; Music FF&CL at 23-33.

63. The Panel should acknowledge that there is no flawless formula or study that can precisely reflect or predict the relative shares that the various claimants would receive in an unregulated market. The claimants offered evidence that they hope the Panel will find helpful, but that evidence is often designed to maximize the share each hopes to receive, and none of the studies is perfect. Music demonstrated the reasons for a modest increase in its share, and no other claimant presented sufficient or credible evidence to reduce Music's award or significantly alter any prior awards. They simply have not met the burden of proving that the method used by the 1983 CRT to calculate Music's share was "incorrect." Nat'l Ass'n of Broads. v. Copyright Royalty Tribunal, 772 F.2d at 932; JSC FF&CL at 2.

A. Music Use as a Measure of Value

64. Several claimants cited the unremarkable proposition that the music use study does not measure the relative value of copyrighted music as compared to all other claimants' copyrighted materials.[23] E.g., JSC FF&CL at 240-41. It was not intended to. It was intended solely to compare the use of music between one period and another, to demonstrate changed circumstances. It shows an increased use of music. The study was not intended to directly measure the relative value of Music's share. Accordingly, the criticisms on that basis are misplaced.

[23] At the same time, none of other claimants, including JSC, measured the relative value of music as compared to the actual programs retransmitted to the cable operators.

65. Music's study was also criticized for measuring duration, rather than different types of music use (i.e., feature, theme, background). As Dr. Boyle testified, ASCAP and BMI (represented jointly in this proceeding, together with SESAC, which has its own rules) do not have a single or consistent method for crediting different types of music uses, and each system on its own is quite complex. Boyle Tr. 4440; Schink Tr. 8504:2-8506:4. To attempt to measure different uses and harmonize the systems employed by each organization would have added at least two levels of complexity to the analysis, likely generating more heat than light. And, JSC introduced the credit study prepared by Dr. Boyle for the 1989 case (which all others saw before they decided to settle with Music), which corroborates Dr. Boyle's testimony that increases in overall duration will track reasonably closely the feature, theme and background uses. Boyle Tr. 4858. The 1989 credit analysis showed an increase in feature uses of more than 30% between 1983 and 1989. Schink R.T. App. B at 12. In addition, Music offered the testimony and video evidence of Snuffy Walden and Jeffrey Lyons showing that movies and episodic television are making greater use of feature music. Walden D.T. at 6,7; Lyons D.T. at 14-15; Music Exs. 5-7, 20. Similarly, Music's video evidence and testimony shows that sports events and news shows frequently used popular songs as background and transitions. Music Ex. 1. Finally, PTV's focus on musical concerts in its schedule during the 1990s, particularly during pledge drives, supports a finding of increased feature use. As Dr. Boyle testified, an increase in overall duration generally indicates an increase in use of each type of music. Boyle Tr. 4855:19-21.

B. Music's Station and Week Samples

66. A number of claimants asserted that Music's sample of stations was flawed. JSC's suggestion that Music (mistakenly) selected the sample stations by

different methods for 1991-1992 and 1998-1999 (JSC FF&CL at 235-36 & n.66) is simply wrong, as is PTV's perception that Music's sample was not designed to represent all distant signal stations (PTV FF&CL at 70).

67. Music used a stratified random sample for each period, automatically including the top five (in 1991-1992) and the top ten (in 1998-1999) stations based on copyright royalty payments, and a sample of the rest, randomly drawn from a pool stratified by copyright fees generated. The effect of this type of sampling method is that the higher paying stations had a better chance of inclusion. Boyle D.T. at 9-11. This sampling methodology – choosing economically significant items with certainty and including a random sample of less significant items, is standard. Mr. Lindstrom used the same method for the Program Suppliers: his study ranked the stations by subscribers and chose the top 50 with certainty, and a sample of the remainder. Lindstrom D.T. at 5. JSC's Bortz study also did the same thing, basing stratification on copyright royalty payments. JSC Ex. 1 at 8. Bortz automatically surveyed the stations that paid $150,000 or more in royalties, and stations that paid less had a lower chance of being sampled. Trautman Tr. 246-48; JSC FF&CL at 43-45. As JSC observed, the sampling plan for Bortz was designed so that proportionately more systems with larger royalty payments were likely to be sampled, to ensure that the survey would provide a statistically valid predictor for allocation of royalty payments that were actually made. JSC FF&CL at 45. Music's study was designed for the same legitimate purpose. Boyle D.T. at 10.

68. Several claimant groups criticized Music for starting with a 1991-1992 sample that was originally drawn for the 1989 case. This argument has no merit because Music confirmed that the stations all met the sample selection criteria in 1991-1992

(Boyle D.T. App. A at iii-iv), and there is no evidence that the selection caused or reflects any bias.

69. Some claimants further criticized the sample for (a) failing to include PTV stations in the WRST sample stations, and (b) selecting the 1998-1999 top-ten stations based on total fees generated, which had the effect of including two PTV stations in the 1998-1999 sample. These criticisms, too, are baseless. Unlike the Bortz study, which excluded automatically the systems carrying a PTV station only, Music's study did not automatically exclude PTV stations from the sample (and thus Music's results do not need to be "adjusted" for the biases built into Bortz). As the sample was designed and drawn, two PTV stations were included in the 1998-1999 sample, although no PTV stations were selected for the 1991-1992 sample.[24] Nevertheless, the suggestion that this may have skewed the results (e.g., Program Suppliers FF&CL at 226) is baseless. First, the fact that no PTV stations were randomly drawn in the WRST representative station sample is irrelevant. Because both the 1991-1992 and 1998-1999 samples included the same WRST stations, the failure to include a PTV station within the WRST stations has no effect. If anything, because PTV made significant use of music in 1998-1999 (PTV Ex. 6), adding a PTV station to the WRST stations would show an even greater increase in average minutes of music. Second, Music's unchallenged rebuttal evidence

[24] All parties recognize that some systems pay a minimum royalty although no distant signals are carried, and there were many more such systems in 1998-1999 than in 1991-1992. E.g., Martin D.T. at 3-4. Similarly, systems carrying only one PTV station pay a full DSE, even though in the absence of the minimum fee they would pay only ¼. 17 U.S.C. § 111(f). But all of the royalties collected are paid out to the claimants here, in the same proportions as the Panel decides for the entire pool. There is no legitimate reason to arbitrarily exclude the PTV-only stations, and there is no question that in both

demonstrated that the results did not materially change when Music used distant fees generated (as opposed to total fees generated) to select and weight the sample, or when the PTV stations were excluded from the sample. Boyle R.T. at 8-10; Music Exs. R-5, R-6. Had Music Claimants deliberately selected the sample stations to be sure to include PTV in both periods, that methodology would also have generated criticism for not being random.

70. Program Suppliers noted (without explaining why it might be relevant) that one of the WRST sample stations was an independent station in 1991-1992, and became a network affiliate in the 1998-1999 period. Program Suppliers FF&CL at 227. This fact has no bearing on the study, and in any event, conservatively lowers the music use figure in the 1998-1999 period if it is accepted, because, as some claimants argue, a Network affiliate may use less music than an independent station. NAB Demo 15; Boyle Tr. 4876:6-10.

71. Program Suppliers also observed that the FCC composite week was not designed for the purpose Music used it, there are more dates in the second half of the year, and one of the dates in one of the years was not consistently selected due to an error. Program Suppliers FF&CL at 225-26. The sample week was designed to be an unbiased, randomly selected week of days representing every day of the week and every period of the calendar year. Boyle D.T. at 12. The composite week was randomly chosen by the FCC, an authority having no connection to Music (Krupit D.T. at 5-6). No claimant has shown that the dates imparted any bias into the study.

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periods, Music Claimants measured minutes of music only on programs that were actually retransmitted by cable systems to distant markets. Krupit D.T. at 6-7.

72. Similarly, NAB summarily asserted that Music's station sample "was not representative" and that the dates "were not representative." NAB FF&CL at 120. However, Dr. Fratrik also used stratified random sampling and selected his dates with a random number generator. NAB Ex. 10 at 6-8. There is no evidence that Mr. Krupit's use of the FCC composite week (chosen randomly in 1983 and adjusted for changed days across years) is any less representative that Dr. Fratrik's date selection methodology, or any other random date selection methodology that might have been used.

C. Music's Weighting

73. A number of claimant groups claimed that Music's weighting of the stations was improper. E.g., JSC FF&CL at 239 n.79, 247; Program Suppliers FF&CL at 228. Although JSC's witness contended that Music was wrong to weight the stations by fees because it somehow renders the weights "random," JSC criticized Dr. Fairley's adjustments to Bortz because he failed to weight his results to reflect the comparatively minimal royalties paid for PTV carriage. JSC FF&CL at 18. And, as Dr. Boyle explained, the weighting was not "random." The top stations, and "WRST" representing the remaining stations, were each fairly weighted by royalty fees generated – to properly reflect the varying contributions of the systems to the royalty pool, and accounting for 100% of the royalty payments. Boyle D.T. at 13-15; Music Exs. 40, 41. Dr. Schink's assertions that weighting by fees generated (or number of subscribers or cable systems) is flawed and prohibits effective statistical testing is incorrect and unsubstantiated. The record reflects that Dr. Boyle has decades of experience conducting and supervising music use samples and studies. He supervises ASCAP's surveys, working with outside experts, under the supervision of the Department of Justice. Boyle D.T. at 1; Boyle Tr. 4434:15-20. Dr. Boyle's methodologies are sound.

74. Finally, in response to criticisms that the weighting should have reflected only distant fees generated rather than total fees generated, Music Claimants performed the calculations on that basis, and confirmed that there was no statistically significant difference in average weighted minutes of music in the periods compared.[25] Boyle R.T. at 8-10; Music Exs. R-5, R-6.

D. Music's Treatment of WGN-Substituted Programming

75. The criticisms leveled against Music's failure to exclude substituted programming on WGN from its study (e.g., Program Suppliers FF&CL at 228; JSC FF&CL at 238 n.74) were addressed in Music's Rebuttal Case.[26] Music re-calculated the average minutes of music for 1998-1999 excluding the WGN-substituted programming, and determined that there was no statistically significant difference in average minutes of music. Dr. Boyle analyzed the effect of removing substituted WGN programming and determined that the average minutes of music per hour on WGN excluding substituted programming was 22.45, or only a 0.35% reduction from the 22.53 average minutes of music per hour including substituted programming. Boyle R.T. at 7; Music Ex. R-4. Applying the WGN number that excluded substituted programming to the remainder of the music use study, Dr. Boyle determined that overall weighted music use increased by 10.84% between 1991-1992 and 1998-1999 (as compared to 11.04% with WGN

[25] The distant fees generated tracks distant subscribers, so the result would again be the same if Music weighted its results by distant subscribers, as Dr. Fratrik did for his time study, and as Mr. Lindstom did to select the sample for Program Suppliers' study.

[26] Not surprisingly, JSC relegated this criticism to a footnote because Bortz did not exclude WGN substituted programming from its survey questionnaire. JSC FF&CL at 95.

substituted programming.) Boyle R.T. at 7-8. The confidence intervals indicate that this increase is still statistically significant. Boyle R.T. at 8, App. B.

76. Unlike the JSC, Program Suppliers and NAB, however, Music Claimants have not received any other compensation for the music used in substituted programs. Boyle R.T. at 7. As a legal matter, Music recognizes there is an argument that the substituted programming on WGN are not retransmissions and thus are not compensable. But see Hubbard Broad., Inc. v. So. Satellite Sys., Inc., 777 F.2d 393, 397-401 (8th Cir. 1985). A decision by the Panel that WGN substituted programming is not covered by the compulsory license should not affect Music Claimants' share. Nevertheless, Music Claimants request a clear ruling on this matter for clarity in future proceedings.

E. Sufficiency of Music's Data

77. NAB observes that Music Claimants matched "only" 77% of the programs retransmitted on sample stations in 1991-1992, and 73% in 1998-1999. NAB FF&CL at 117-18. The Bortz survey, however, which NAB endorses to support its own case, achieved response rates of "only" 57% of the sample in 1998 and 67% in 1999. JSC Ex. 1 at 9.

78. JSC's criticism that the matched cue sheets in the Music study were not consistent across time periods or across the claimant groups (JSC FF&CL at 238) is ironic. As Mr. Krupit testified, in the 1991-1992 and 1998-1999 time periods, the rate of matched cue sheets has held at about the same level, and the types of programming associated with unmatched cue sheets were the same – local news, sporting events, and infomercials. Krupit Tr. 4279:5-20 ("generally there was the same class, the same ratio of these types of shows that were missing from both sets of years"). As Mr. Krupit explained, the producers of news and sports programs do not consistently provide cue

sheets to the performing rights organizations, and when they do submit cue sheets, they tend to under-report the music used in the programs. Krupit Tr. 4281:4-12, 4282:18-4283:7, 4354-55. The Music Claimants should not be penalized because the owners of the copyrights in certain non-music portions of programs fail to supply complete music use data. Tr. 4283:12-13 (Judge von Kann stating "it's asking the fox to report how many chickens they've eaten").

79. Ironically, claimants representing the two program types that fail to accurately report music use (sports and news) do not hesitate to rely on the few available cue sheets in the music study to calculate their alleged average music use, for purposes of allocating Music's share among the other claimant groups.[27] But as the claimant groups who do comply in submitting cue sheets recognize, the music use study was not designed to reflect accurately or adequately any particular group's relative music use. PTV FF&CL at 136; Program Suppliers FF&CL at 230.

VI. MUSIC CLAIMANTS' USE OF THE 1991-1992 SETTLEMENT IS APPROPRIATE

80. Many of the other claimant groups assert that Music Claimants may not properly compare changed circumstances since 1991-1992, because Music's share in that period was a settlement. E.g., JSC FF&CL at 241-45. Music has addressed, in its FF&CL, the reasons why the Panel should regard 1991-1992 as an appropriate benchmark for examining changed circumstances, and as probative of the perceived market value for music in 1991-1992. Music FF&CL at 20-23, 71-75. All of the other claimant groups are alleging changed circumstances since 1991-1992, because they all

[27] Part VII below contains a more detailed discussion as to why such an allocation of music's share would be improper.

litigated their 1991-1992 shares. NAB FF&CL at 3-4, 8-25; PTV FF&CL at 14-21; Program Suppliers FF&CL at 175; Canadian Claimants FF&CL at 2-4.[28] In fact, JSC argues that the issue before the Panel is whether "the CARP's conclusions in the 1990-92 proceeding are wrong . . . ." JSC FF&CL at 2. The Panel cannot properly determine the relative values in 1998-1999 by reference to changed circumstances without considering a consistent benchmark across claimant groups. In any event, Music's position that music use has increased over time is corroborated by evidence of increased music use on the top two royalty generating stations between 1983 (when Music last litigated) and 1998-1999 (Krupit R.T. at 1-7; Music Exs. R-1, R-2, R-3), as well as the duration study and music credit study prepared for the 1989 case and introduced by JSC (Schink R.T. Apps. B, C).

81. And significantly, despite all their protestations, the claimants presented no testimony to the effect that they did not regard the settlement as reflective of fair

[28] See also Ducey D.T. at 4 ("I will comment on some significant changes in the cable industry since 1992, the last year for which the distribution of cable copyright royalties among Phase I parties was decided by a CARP."); Fratrik D.T. at 2 ("I was asked to conduct a study analyzing the relative amounts of time represented by various categories of programming aired on distantly carried television signals in 1992 and 1998-1999."); JSC D.T. Prehearing Memorandum at 1 ("JSC's case addresses . . . the nature of the JSC's royalty claim and how that claim has changed since the last litigated Phase I proceeding (involving allocation of the 1990-1992 cable royalties) . . . [and] the change in circumstances surrounding the size and composition of the cable royalty funds from the 1990-92 period to the 1998-99 period."); Johnson D.T. at 1 ("I address the issue of how the royalty award of 5.5% to public television . . . for the year 1992 should be adjusted for the years 1998 and 1999 in light of relevant intervening considerations."); Gruen D.T. at 32 ("Since the proceedings allocating cable royalties for the 1990-1992 period, there has been a significant change in the marketplace."); Bennett D.T. at 4 (comparing 1992 and 1998 Cable Data Corporation carriage data).

market value or a likely litigation outcome for Music in 1991-1992. They were all well aware of Music's position; there was no enforced restriction on introducing new material on direct or re-direct examination; and any claimant could have offered rebuttal testimony concerning the settlement. They did not. Instead, the only evidence challenging Music is Dr. Schink's bald speculation as to the possible motives behind the universal decision to settle with Music in 1991-1992. Dr. Schink, however, has no personal knowledge of the facts, and is not qualified as an expert on the 1991-1992 settlement, or what conclusions the Panel should draw from it.

82. Based upon the Copyright Office's prior ruling, the Panel is to determine the weight to be given to evidence of the 1991-1992 settlement in which Music received 4.5% of each of the funds. The Music Claimants have argued that, although such evidence is not a benchmark in the formal sense of a litigated award by a previous CARP or by the CRT, the 1991-1992 settlement is probative evidence: (a) of the allocation of royalties in 1991-1992; (b) of the claimants' perceived value of music in 1991-1992; (c) that the claimants perceived the level of music use in 1991-1992 as consistent with the level of music use in 1983; and (d) of what would likely occur in an open market, because music license negotiations in an open market are generally the result of comparisons with prior negotiated license fees. At the least, the settlement suggests that the other claimants determined that "the expected cost of litigating the Music Claimants' 4.5% share exceeded the value (individually and collectively) of the expected decrease in the Music Claimants' share that could be accomplished by litigation." JSC FF&CL at

243. Therefore, the other claimants preferred the settlement to the anticipated outcome of a hearing (including in such outcome the litigation costs which would be incurred).[29]

83. Finally, the settlement is relevant evidence that casts doubt on the claimants' suggestion the Music's litigated share, which has always been between 4.25% and 4.5%, should precipitously drop by 50% or more.

84. The precedent cited by JSC and referenced in the Copyright Office's opinion (JSC FF&CL at 244-45) involves situations in which the type of evidence described above was not introduced to provide the factual context suggesting the relevance of the settlement. In those situations, unlike here, there was apparently no independent showing that the rate or allocation at issue would, in an open market, be set by reference to a previously negotiated rate. Music FF&CL at 20-23. In addition, Music Claimants are not seeking to use the 1991-1992 settlement as a benchmark for "changed circumstances" within the meaning of the U.S. Court of Appeals opinion in Nat'l Ass'n of Broads. v. Copyright Royalty Tribunal, 772 F.2d at 932. Rather, Music Claimants advocate the use of the 1983 award as such a benchmark and seek to use the 1991-1992 settlement as one piece of evidence to establish changed circumstances as well as to

[29] Of course, every settlement has the advantage of saving litigation costs for the settling parties, but, when the settling parties (the other claimants in this case) go on to litigate the case among themselves, the marginal litigation expense saved by settling with Music is relatively small. Thus, if one were to subtract that marginal litigation expense saved by settling with Music from the 4.5% of some $500 million that the settlement represented, it is likely that the amount would still be very close to 4.5%. In contrast, when Music Claimants settled for 4.5% in 1989, they compromised their claim to a 5% share (merited by the music use evidence in 1989 (Schink App. B)), in exchange for significantly reduced litigation expenses and elimination of any risk.

confirm the rate that would likely be set in an open market. And, unlike other settlements (for example, the 1993-1997 settlements) the settlement language at issue here does not preclude its use as evidence – it simply is not an enforceable precedent – standing alone. Although the other claimants argue that the Panel should take care not to discourage future settlements by using the 1991-1992 settlement at all, such policy concerns do not require – or even militate in favor of – ignoring the 1991-1992 settlement. It is a simple matter to draft language that precludes any use of a settlement; indeed, the claimants did so for 1993 through 1997.

VII. THE PANEL SHOULD NOT ALLOCATE THE MUSIC SHARE AMONG THE OTHER CLAIMANT GROUPS.

85. No party in this proceeding argues that Music must prove its share of each other claimant's share. Rather, JSC and NAB submit that, after the Panel determines Music's overall share, it should then determine the proportion of Music's share that each other claimant should bear. JSC FF&CL at 3, 34-35, 258-64; NAB FF&CL at 127-29.[30] Such allocations, however, would not replicate the open marketplace and are contrary to all prior precedent. In addition, the record evidence is insufficient to enable the Panel to make any such allocation, and any recognition of the need to prove differential music use would unnecessarily complicate future proceedings and add a tremendous burden and expense to the claimants.

86. In the open market, the performing rights organizations have not individually licensed shows, or categories of programs, or groups of program owners.

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[30] Program Suppliers recommended that the music share continue to be taken "off the top" (PS FF&CL at 230), and Canadian Claimants were silent on whether differential allocation should occur. While PTV provided data for calculating its differential share, it opposed allocating Music's share among the other claimant groups. PTV FF&CL at 136.

Boyle Tr. 4669:9-16, 4670:8-17, 4959:13-17, 5019:19-5020:9. Instead, ASCAP, BMI and SESAC would likely each give the cable systems (or stations) a blanket license to perform all the music in all the programs retransmitted by the cable operator or station (Boyle Tr. 4412:19-4414:5, 4669:9-16, 4670:8-17, 5019:8-12); Program Suppliers FF&CL at 230). The right to perform the music in programs has a separate market value, but there is no record evidence to support the notion that any television or cable broadcaster has ever sought to pay more or less for a program or program type based on the amount of music therein. While it may be true that an all-sports or all-news network such as ESPN or CNN may command an overall lower percentage of revenue blanket license rate than a general entertainment network such as TNT or TBS, this does not mean that the actual programs on an individual network merit different license fees based on their music use. And in the marketplace, they do not. JSC's and NAB's arguments, that they should somehow bear a smaller proportion of Music's share because their programs use less music, are contrary to precedent and without evidentiary support.

87. None of the quantitative measures offered by any claimant purported to separately measure the value of music in all programming, or any individual programming type. JSC's witness Dr. Crandall, however, testified that in the Bortz survey results, the value of the music in each category is embedded in the value attributed to each program category. Crandall Tr. 832:22-833:9. According to Dr. Crandall, music was "implicit in the total value" given to each category by the Bortz respondents. Id. Because the Bortz numbers, which JSC and NAB endorse, have already taken into account any value difference based on the varying amounts of music in the different types

of programs, Music's share is properly taken "off the top" – and allocated evenly across all program categories.

A. There Is No Precedent in the Twenty-Five Year History of the Compulsory License to Allocate Music's Share Differentially.

88. There is no precedent in the quarter century of cable royalty fund proceedings for allocating Music's share among the other claimants. Boyle D.T. at 3; Boyle Tr. 4958:2-4959:17, 4976:18-4977:7; PTV FF&CL at 136; Program Suppliers FF&CL at 230. In all cable proceedings awarding a share to Music Claimants, that share has been a percentage of the entire royalty funds, not a share of other claimants' awards. 1978 Decision, 45 Fed. Reg. at 63,040, 63,042; 1979 Decision, 47 Fed. Reg. at 9894, 9897; 1980 Decision, 48 Fed. Reg. at 9566-9567, 9569; 1983 Decision, 51 Fed. Reg. at 12,812, 12,818. All settled shares for Music have also been off the top (after NPR's settled share). 1984 Decision, 52 Fed. Reg. at 8420; 1985 Decision, 53 Fed. Reg. at 7140; 1986 Decision, 54 Fed. Reg. at 16,155; 1987 Decision, 55 Fed. Reg. at 11,993; 1989 Decision, 57 Fed. Reg. at 15,304; 1990-1992 Decision, 61 Fed. Reg. at 55,668-55,669. This practice reflects the separate and unique value of music in the unregulated market, and how the other claimants have historically recognized the value of music in their programs. The Panel, which must be guided by "prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel decisions, and rulings by the Librarian of Congress" (17 U.S.C. § 802(c)), should follow this sound tradition.

89. Awarding an unallocated Phase I share to Music was not an accident or oversight by the CRT and prior Panels. As all claimants recognize, music is an element running throughout all programming. 1983 Decision, 51 Fed. Reg. at 12,812; Music FF&CL at 23-33; PTV FF&CL at 136 ("music is an integral component of almost all

programming"). However, the performance right in the music has a separate market value, and the right to use the music in programs is always licensed separately from the programs themselves.

90. In addition, attempting to allocate Music's share creates the danger of converting Music into a de facto Phase II claimant. The Panel has consistently held that Phase I exists to "determine the allocation of cable royalties to specific groups of claimants." 1978 Decision, 48 Fed. Reg. at 63,027. Phase II exists to "allocate royalties to individual claimants within each group." Id. Music has always been a Phase I claimant entitled to a share of the entire royalty pools, and no claimant has ever challenged that status. See, e.g., 1979 Decision, 48 Fed. Reg. at 9879; 1983 Decision, 51 Fed. Reg. at 12,793; 1990-1992 Decision, 61 Fed. Reg. at 55,655. Music does not seek a share of each other claimants' share. In the marketplace, ASCAP, BMI and SESAC seek the relative market value of all of the copyrighted music in their respective repertories in all of the non-network programs retransmitted by the cable systems who pay statutory royalties.

B. The Evidence is Insufficient to Allow the Panel to Allocate Music's Share among the Claimant Groups.

91. There is not sufficient evidence in the record with which the Panel could separately allocate Music's share among the other claimant groups.

1. Eight Cue Sheets and Interim Cable Network Music License Fees Are an Insufficient Basis on Which to Calculate How Much of Music's Award JSC Should Bear.

92. JSC maintains that it should pay 11.7% of Music's share in 1998 and 12.5% in 1999, based on the midpoint of the results of two different calculation methods proposed by Dr. Schink, which yielded considerably different results. JSC FF&CL at

258-64. JSC raised this novel argument for the first time on rebuttal, so nether Music, nor any other claimant, had an opportunity to present rebuttal testimony or evidence.

a. Cue Sheets

93. Based on eight cue sheets from the 1998-1999 period that were available from Music Claimants' music use study, Dr. Schink concluded that JSC programming uses 3.2 minutes of music per hour. JSC FF&CL at 258-59. Comparing this to Dr. Boyle's overall weighted average of 22.0 minutes of music per hour, Dr. Schink concluded that JSC's 1998 share of the Music award was 7.72% and its 1999 share was 8.26%.[31] Schink R.T. at 22-23; JSC FF&CL at 258-60.

94. Dr. Schink's cue sheet methodology suffers from numerous flaws. First, the sample of eight cue sheets is simply too small to make any reliable projections. The music use study was not designed as a statistically valid sample of music use on individual programs or program types. Rather, the study matched cue sheets for programs on the sample stations during a randomly chosen week of programming in each of 1998 and 1999, to determine the average overall music use on all distant signal programs.

95. Second, Dr. Schink did not use his method to calculate all of the claimants' shares, so it does not shed any light on the relative shares each claimant should bear on Music's share. Indeed, because there is no record evidence, Dr. Schink's method cannot be applied to Program Suppliers, PTV, Canadian Claimants or the Devotional Claimants. NAB is the only other party that urged a differential allocation of Music's

[31] Although Dr. Schink rejected Music's weighting of music minutes for purposes of average Music use for all programs on all stations, he compared the weighted average to the music reflected in eight cue sheets for sports programs.

share among the claimant groups.[32] Together, JSC and NAB assert that they should bear only 10% of whatever share Music is awarded. There is no cue sheet evidence to allow the Panel to allocate the remaining 90%.

96. Finally, JSC and NAB should not be rewarded because the producers of those programs fail to reliably submit cue sheets, and also under-report music use. Krupit Tr. 4354:5-4355:7; Boyle Tr. 4844:16-20, 4988:1-8. Any reliance on or application of the "cue sheet" method would encourage other claimants to also stop submitting cue sheets, or to under-report their actual music use. As Music Claimants demonstrated on their direct case, the composers and songwriters who write the music that all of the claimants use in their programs depend to a large extent on their performance royalties from ASCAP, BMI and SESAC to make a living. Saltzman D.T. at 7-8. Being rewarded for authorship goes to the essence of the copyright law. Without accurate cue sheet data, the performing rights organizations cannot properly identify the works being performed and credit their members accordingly.[33] Dr. Schink's allocation recommendations based on a few available cue sheets are irresponsible and should be rejected.

b. Selected Cable Networks

97. Dr. Schink also calculated the share of Music's share that JSC should bear based on the ratio of music license fees to total programming costs paid by "sports cable

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[32] As discussed below, PTV is opposed to a differential allocation, but it has proposed a variation on Dr. Schink's method in the event that the Panel decides to perform a differential allocation.

[33] It should be noted that much of the music used in sports and news programming is identified in tape analysis. Accordingly, the minutes reported on the news and sports cue sheets represent only a fraction of the total music minutes on those programs. Boyle Tr. 4502-03.

networks" and other (non-"music-intensive") cable networks. JSC FF&CL at 261. He concluded that JSC's share of the Music award would be 15.72% in 1998 and 16.70% in 1999 under this method. JSC FF&CL at 263.

98. Dr. Schink's reliance on cable network license fees fails for several reasons. As discussed in Music's FF&CL, there is insufficient data concerning cable network license fees upon which to draw any valid conclusions. Music FF&CL at 57-59. Final music license-fee data is available for only a few cable networks, and then not for each of the performing rights societies. Id. at 58. For many cable networks, only interim fees have been paid at rates set in the Turner case in 1989, based on limited evidence and subject to retroactive adjustment.[34] Id. at 57; United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Turner Broad. Sys., Inc.), Civ. 13-95 (WCC), 1989 U.S. Dist. LEXIS at *9-10 (NAB Demo 12) ("the interim-fee setting process would be much less exacting in view of the need for expedition in deciding the application, the more limited evidentiary record, and the fact that the interim fee would be subject to retroactive modification upon the determination of a final fee"). For many other cable networks, final license-fee figures are confidential, and were not introduced into the record. Boyle Tr. 4544:18-4545:18. Dr. Schink estimated supposed music license fees as a percentage of revenue, for all cable networks, by generalized groups as he apparently

[34] As the CRT recognized in 1980, interim fees at rates set many years prior are not an appropriate basis on which to draw conclusions concerning music license fees. 1980 Decision, 48 Fed. Reg. at 9558.

views the market, and regardless of whether the networks actually pay a percentage of revenue, interim or final, or a per-subscriber or set-fee rate. Schink R.T. at 18, App. H. Then Dr. Schink applied his percentage of revenue rates to the cable networks' actual revenues, to arrive at a dollar fee rate, which he then divided by the cable networks' unidentified "program expenses," to reach his music license fee-as-a-percentage-of-cable-network-program expenses rate. There are so many unwarranted assumptions and unsupported estimates that Dr. Schink's conclusions as to music license fees are completely unreliable. Music FF&CL at 57-59. The flaws in Dr. Schink's methodology apply equally to any effort to use his cable network license-fee estimates to allocate the share JSC should bear of Music's share.

99. Dr. Schink's methodology for allocating JSC's share is also inappropriate because it assumes that the share JSC should bear, for its programs on distant signals, is analogous to the ratio of rates paid by sports cable networks to rates paid by general entertainment cable networks. There is no evidence to support this assumption. Indeed, market evidence suggests otherwise. JSC programming appears in a small percent of the program hours on distant signals. NAB Ex. 10 at 13. Dr. Schink, in essence, is asking the Panel to equate the relative value of its few games on distant signals to cable networks that broadcast sports 24 hours a day (like ESPN and FOX Sports Net). No such comparison is appropriate.

100. Finally, Dr. Schink did not use his cable network method to calculate the relative share each claimant group should bear of Music's share. As with his cue sheet method, his calculation is meaningless because it cannot be applied consistently to all claimants, to determine the relative share each should bear of Music's share.

c. Combining Both Methods

101. The cue sheet and selected cable network methods lead to vastly different results – a variance of more than 100% for both years (7.72% and 8.26% by the cue sheet method; 15.72% and 16.70% by the cable network estimates). JSC FF&CL at 263.

102. To reconcile these vastly different results, JSC simply took the midpoint between the cue sheet and selected cable network ranges. JSC FF&CL at 263-64. Dr. Schink supplied no explanation as to whether and why the midpoint of the results of two entirely different methods is valid.[35] In any event, as with either method, it is impossible to replicate Dr. Schink's method to calculate the midpoint of the range for all claimants.

103. Under the 1990-1992 settlements, JSC was on notice that it would bear a proportionate share of Music Claimants' 4.5% share. JSC's suggestion to the contrary (JSC FF&CL at 35) is not supported by evidence or reasonable inference.

2. NAB's Evidence Is Insufficient.

104. To allocate its Music share, NAB recommends that the Panel consider Dr. Schink's cue sheet method, or alternatively "music license fees charged to a similar cable network." NAB FF&CL at 127-29. Unlike JSC, NAB did not use these methods in combination, and NAB offered no guidance about which method is more accurate or reliable. NAB's attempt to show that it should pay only a small portion of Music's share is flawed and provides an insufficient basis to allocate to NAB a differential share of Music's award.

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[35] Dr. Gruen made a midpoint adjustment to his avidity calculations, which the Panel questioned (Gruen Tr. 7861:16-7862:5) and the NAB criticized as "arbitrary" (NAB FF&CL at 74).

105. NAB's cue sheet method suffers from the same defects set forth above with respect to JSC. In addition, NAB added another distortion to the method by counting only cue sheets for "station produced news" programs. NAB FF&CL at 128-129. When it came to music use, the NAB ignored the "variety of other programs" they represent, including coaches shows, pre- and post-game shows, ad specials about home teams, morning programs on many stations, public affairs shows, documentaries and specials. NAB FF&CL at 28-29; Music Ex. 1; NAB Ex. 8. Thus, the cue sheets on which NAB relies do not even reflect the total music in the NAB programs transmitted on distant signals during the time period of Music's study, for which the producers in fact submitted cue sheets.

106. NAB alternatively suggested allocating Music's share "based on the music license fees charged to a similar cable network." NAB FF&CL at 129. NAB failed to provide the Panel with the identity of or data for a "similar cable network," or any calculation for allocating Music Claimants' share on this basis.

3. PTV's Evidence Is Insufficient

107. Although PTV does not endorse a differential allocation of Music's share, it chose to provide some evidence on the issue. PTV FF&CL at 136 ("Because music is an integral component of almost all programming, it is extraordinarily difficult to attribute music's share to one program category more than another, and attempting to do so introduces greater cost and complexity into these proceedings").

108. Unlike JSC and NAB, PTV offered no cue sheet evidence. Instead, PTV asked the CARP to consider the music license fees set in the Section 118 proceeding. PTV FF&CL at 136; NCBRA Decision. In effect, PTV is asking the Panel to simulate the marketplace by relying on another CARP proceeding that attempted to simulate the

marketplace for ASCAP and BMI acting individually (not collectively as in this Proceeding). PTV provided two sets of data: (1) music license fees as a percentage of 1998-1999 total revenues (0.26%) and private revenues (0.44%), and (2) music license fees as a percentage of total programming expenses in 1998 (0.59%) and 1999 (0.56%). PTV FF&CL at 137.

109. This evidence is insufficient to allocate PTV's share of music for several reasons. With regard to the first set of data (music license fees as a percentage of 1998-1999 total revenues), PTV provided no method to calculate its share of the Music award. PTV provided numbers, but never explained how they should be used other than "for guidance." PTV FF&CL at 136.

110. With regard to the second set (music license fees as a percentage of total programming expenses), PTV stated that its ratio could be applied to Dr. Schink's formula for selected cable networks. PTV FF&CL at 71-72. PTV supplied commercial broadcasting stations' ratio of music license fees to programming expenses (estimated by Dr. Schink at 1.49%), and PTV's ratio of music license fees to programming expenses (calculated by PTV at 0.59%, although the basis for that is not clear). PTV FF&CL at 72. PTV, however, based its 0.59% ratio on combined public television and public radio programming expenditures of about $1 billion in each 1998 and 1999 (PTV FF&CL at 71 n.30). The total programming expenditures by PTV stations alone are substantially lower – $743 million in 1998 and $772 million in 1999 (PTV FF&CL at 91, 114).

111. PTV's reliance on either set of data for its allocation is suspect, in view of its insistence (accepted by the CARP in the Section 118 proceeding) that for-profit television and cable networks are not analogous to PTV broadcast stations.

112. In sum, there is insufficient data and no coherent methodology provided by the other claimants for allocating among the other claimants the share each should bear of the Music Claimants' award. The Panel is left with a handful of false analogies that must be rejected.

E. The Other Claimants Proposed No Method to Allocate Music's Share Consistent with Music Receiving Equal Shares of the Three Funds.

113. The other claimants apparently agree that Music's overall shares of the royalty funds should be the same. JSC FF&CL at 3, 34, 232 (same share of the Basic and 3.75% funds); NAB FF&CL at 154 (same share of all three funds). Awarding Music the same shares of the three funds is consistent with the 1983 CRT decision, which found that the record was "devoid of any reasonable basis to make a distinction among the three funds regarding the contribution and value of music." 1983 Decision, 51 Fed. Reg. at 12,814-15. The other claimants fail to explain, however, how it is appropriate to allocate Music's share among themselves when each of the three funds has different claimants and programming.[36] Indeed, this failure contradicts the other claimants' proposed bases for determining Music's share – as a percentage of expenses. No doubt this ratio changes as the mix of programming changes. Nevertheless, their proposals fail to account for these changes and simply award Music the same share in each fund. If anything, this underscores the conclusion that basing Music's share in any way on the ratio of music fees to broadcast rights or other expenses is contrary to precedent and inappropriate.

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[36] The other claimants also failed to propose any methodology for allocating a portion of Music's share to Devotionals. Given the lack of record evidence related to the Devotionals programming, the Panel simply cannot make a fair allocation of Music's share among all claimant groups.

VIII. THE MUSIC CLAIMANTS' SHARE SHOULD NOT BE ADJUSTED BECAUSE OF THE DEVOTIONAL CLAIMANTS' SETTLEMENT.

114. On November 15, 2002, all of the claimant groups (except NPR which had previously settled) entered into a "Stipulation of Settlement of Claim of Devotional Claimants to 1998 and 1999 Cable Royalty Funds" (the "Devotionals' Settlement"). Pursuant to its terms, the Devotional Claimants received (net of the NPR settlement) 1.19375% of the Basic Fund and 0.90725% of the 3.75% for both 1998 and 1999. These figures matched the awards made to the Devotionals by the CARP in the 1990-1992 Proceeding, after accounting for Music's settlement at its traditional 4.5% share.

115. There is no dispute that the Panel in this Proceeding, in dividing the 100% post-NPR settlement pool, must allocate to the Devotionals the amounts specified in the Devotionals' Settlement. A question arises as to whether it is necessary for the Panel to make an initial determination as to the relative values (out of 100%) of the litigating claimant groups and then make an adjustment to account for the Devotionals' Settlement. Neither JSC nor Program Suppliers propose any such adjustment in their proposed findings of fact and conclusions of law. PTV and NAB both propose adjustments that result in the proportional allocation of the Devotionals' Settlement, but exclude Music from this allocation. PTV FF&CL at 136 (Music should be taken off the top), 662;[37] NAB FF&CL at 160-61. Uniquely, the Canadian Claimants propose that the Panel reduce the relative share of each of the litigating claimants (including Music) by its proportionate share of the Devotionals' Settlement. Canadian Claimants FF&CL Apps.

[37] PTV also excluded the Canadian Claimants from its proportional allocation of the Devotionals' Settlement.

B, C. As regards Music, the approach advocated by the Canadian Claimants is flawed and should be rejected.

116. To the extent the Panel decides to reduce relative shares to accommodate the Devotionals' Settlement, such reduction should be made to each of the program categories but not to Music, as a program element that runs throughout all programming. The reason Music must be excluded from any reduction is that the Devotionals' settled share was already reduced to account for the music in Devotional programming. In the 1990-1992 proceeding, the CARP originally awarded 1.25% of the Basic and 0.95% of the 3.75% Funds to the Devotionals. However, these awards failed to account for Music's 4.5%. 1990-1992 Decision, Panel Report at 143. Due to this oversight, the Devotionals' award (as well as that of each of the other claimants) was reduced by the Librarian to the percentages for which they settled in this case. Because the Devotionals' Settlement was derived from its percentage of the non-Music share of the funds, it would be improper to allocate any portion of Music' share to the Devotionals.

IX. ANY PERCENTAGE OF THE FUND ATTRIBUTABLE TO CARRIAGE OF RADIO SHOULD BE AWARDED TO THE MUSIC CLAIMANTS

117. JSC and NAB propose limited findings of fact related Music's evidence of distant signal radio carriage. See JSC FF&CL at 256-57; NAB FF&CL at 130. Music presented certain Statements of Account, internal BMI documents showing carriage of radio signals by cable systems, and testimony concerning radio for the limited purpose of demonstrating that incidences of distant radio carriage still existed in 1998 and 1999. Krupit D.T. at 10-11, Music Claimants' Exs. 35, 36. None of the other claimants introduced any evidence relating to carriage of radio.

118. To be clear, Music Claimants do not request that the Panel make a separate award for radio carriage. While the compulsory license under Section 111 applies to distant signal carriage of radio as well as television, the CRT has previously determined that "the value of commercial radio in the cable marketplace is *de minimus*" and that any award to Music attributable to radio is "incalculable and extremely small." 1979 Decision, 49 Fed. Reg. at 20,051. Music Claimants do not ask the Panel to modify this conclusion, but rather merely to recognize that carriage of distant signal radio continued in 1998 and 1999, as it had previously.

X. CONCLUSION

119. JSC – and the other claimants who endorse or modify JSC's position concerning Music Claimants' share – have not met the legal standard for achieving a major change in Music Claimants' allocation. They have not presented evidence that establishes material changes in any relevant circumstances since 1983; no party has proved that the CRT erred in 1983 (or any prior year). The efforts to slash Music's share by relying on mathematical formulas that ignore the most recent precedents, that refuse to accord benchmark status to a prior CRT decision, and that are skewed by the inclusion of non-compensable broadcast Network and cable network data, are fatally defective. Furthermore, a differential allocation of Music Claimants' award among the other claimants would not simulate the workings of a hypothetical market, would disregard decades of precedent, and is unsupported by the record of this proceeding.

120. As JSC correctly observes, the system for allocating this royalty pool "would become completely unworkable if established precedent . . . were changed lightly." JSC FF&CL at 2. On the basis of this record, any significant departure from Music Claimants' prior allocations would ignore this sound principle.

Respectfully submitted, Dated: September 5, 2003

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CERTIFICATE OF SERVICE

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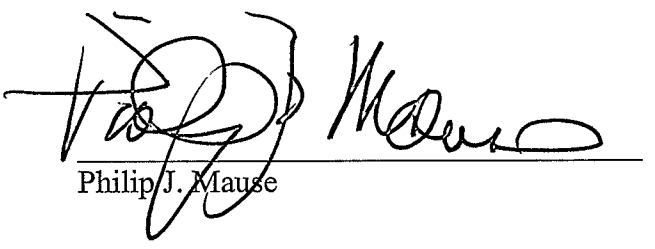

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